

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

JOHN ROBERTSON WILKERSON, 5792448 §

VS. § CIVIL ACTION NO. 4:11cv256

DIRECTOR, TDCJ-CID §

REPORT AND RECOMMENDATION  
OF UNITED STATES MAGISTRATE JUDGE

Petitioner, an inmate confined in the Texas prison system, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

Background

Petitioner is challenging his Hopkins County conviction for possession of a controlled substance, namely cocaine, with intent to deliver, Cause No. 12971. Petitioner states that, on February 7, 1991, a jury found him guilty and sentenced him to fifty-five years of confinement. The Sixth Court of Appeals affirmed his conviction on April 7, 1992, Cause Number 06-91-00014-CR.. On October 19, 1994, the Texas Court of Criminal Appeals denied his state writ of habeas corpus without written order. Petitioner also filed writs of mandamus, which were denied. On January 19, 2011, the Texas Court of Criminal Appeals dismissed his second state writ of habeas corpus pursuant to Section 4 of Article 11.07.

The present petition for a writ of habeas corpus was filed in the United States District Court, Northern District of Texas on April 14, 2011. Petitioner specified that he placed the petition in the prison mailing system on April 8, 2011; thus, it is deemed filed on April 8, 2011, in accordance with

the “mailbox rule.” *See Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998). The case was transferred to the Eastern District of Texas, Sherman Division on May 6, 2011. Petitioner claims he is entitled to relief based on double jeopardy, ineffective assistance of counsel, the trial court’s abuse of its discretion, and the appellate court’s abuse of its discretion. The Government was not ordered to file a Response.

#### Antiterrorism and Effective Death Penalty Act of 1996

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was signed into law. The law made several changes to the federal habeas corpus statutes, including the addition of a one year statute of limitations. 28 U.S.C. § 2244(d)(1). The AEDPA provides that the one year limitations period shall run from the latest of four possible situations: the date a judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review; the date an impediment to filing created by the State is removed; the date in which a constitutional right has been initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. *Id.* at § 2244(d)(1)(A)-(D). The AEDPA also provides that the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation. *Id.* at 2244(d)(2).<sup>1</sup>

In the present case, the Petitioner is challenging his conviction. The appropriate limitations provision is § 2244(d)(1)(A), which states that the statute of limitations started running when the conviction became final. Petitioner did not file a petition for discretionary review; thus the conviction

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<sup>1</sup> The Fifth Circuit discussed the approach that should be taken in applying the AEDPA one year statute of limitations in *Flanagan v. Johnson*, 154 F.3d 196 (5th Cir. 1998) and *Fields v. Johnson*, 159 F.3d 914 (5th Cir. 1998).

became final when the opportunity to file a petition for discretionary review had expired. He had thirty days after the court of appeals issued a decision to file a petition for discretionary review. Tex. R. App. Proc. 68.2(a). The Sixth Court of Appeals affirmed his conviction on April 7, 1992; thus, his conviction became final thirty days later, on May 7, 1992. But Petitioner's judgment became final prior to AEDPA's effective date. To prevent inequity, the Fifth Circuit made allowances for a prisoner whose conviction became final before AEDPA's effective date. *See Fisher v. Johnson*, 174 F.3d 710, 712 (5<sup>th</sup> Cir. 1999). It gave prisoners a reasonable length of time during which to file a petition – a one-year grace period. *Id.* The AEDPA became effective on April 24, 1996, and the one-year grace period expired on April 24, 1997. Thus, the present petition was due no later than April 24, 1997, in the absence of tolling provisions. It was not filed until April 8, 2011 – thirteen years, eleven months, and fifteen days beyond the deadline.

Petitioner's first state application for writ of habeas corpus was denied without written order on October 19, 1994 – prior to the limitations deadline. He states that his remaining state application for writ of habeas corpus was filed December 2, 2010. Its filing occurred after the federal filing deadline of April 24, 1997. Consequently, it does not serve to toll the statute of limitations. *See Scott v. Johnson*, 227 F.3d 260, 263 (5<sup>th</sup> Cir. 2000) (noting that the statute of limitations is not tolled by a state habeas corpus application filed after the expiration of the limitations period). Petitioner's § 2254 petition is time-barred in the absence of any other tolling provisions.

On June 23, 2011, the Clerk of the Court received Petitioner's response to this Court's order to address the timeliness of his §2254 motion. Petitioner simply reurges the issues already presented in his § 2254 petition, asks to be transferred to a different facility with a better law library, and requests appointment of counsel. He presents no evidence that his petition was timely filed or that he has been diligently pursuing his rights. He simply claims that he has been denied access to documents concerning

his case. Federal courts do not “consider a habeas petitioner’s bald assertions on a critical issue in his *pro se* petition . . . mere conclusory allegations do not raise a constitutional issue in a habeas proceeding.” *Smallwood v. Johnson*, 73 F.3d 1343, 1351 (5th Cir. 1996) (quoting *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983)). Conclusory claims are insufficient to entitle a habeas corpus petitioner to relief. *United States v. Woods*, 870 F.2d 285, 288 (5<sup>th</sup> Cir. 1989); *Schlang v. Heard*, 691 F.2d 796, 799 (5<sup>th</sup> Cir. 1982).

The United States Supreme Court recently confirmed that the AEDPA statute of limitation is not a jurisdictional bar, and it is subject to equitable tolling. *Holland v. Florida*, 560 U.S. —, 130 S. Ct. 2549, 2560, 177 L. Ed.2d 130 (2010). “A habeas petitioner is entitled to equitable tolling only if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Mathis v. Thaler*, 616 F.3d 461, 474 (5<sup>th</sup> Cir. 2010) (quoting *Holland*, 130 S. Ct. at 2562). “Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate.” *Alexander v. Cockrell*, 294 F.3d 626, 629 (5<sup>th</sup> Cir. 2002). The petitioner bears the burden of proving that he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5<sup>th</sup> Cir. 2000).

The Fifth Circuit has held that the district court has the power to equitably toll the limitations period in “extraordinary circumstances.” *Cantu-Tzin v. Johnson*, 162 F.3d 295, 299 (5th Cir.1998). In order to qualify for such equitable tolling, the petitioner must present “rare and exceptional circumstances.” *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir.1998). In making this determination, it should be noted that the Fifth Circuit has expressly held that proceeding *pro se*, illiteracy, deafness, lack of legal training, unfamiliarity with the legal process, and claims of actual innocence are insufficient reasons to equitably toll the statute of limitations. *Felder v. Johnson*, 204 F.3d 168, 173 (5th Cir.2000).

As a general rule, equitable tolling has historically been limited to situations where the petitioner “has actively pursued his judicial remedies by filing a defective proceeding during the statutory period, or where the [petitioner] has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed.2d 435 (1990). Furthermore, equitable tolling cannot be used to thwart the intent of Congress in enacting the limitations period. *See Davis*, 158 F.3d at 811 (noting that “rare and exceptional circumstances” are required). At the same time, the Court is aware that dismissal of a first federal habeas petition is a “particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.” *Lonchar v. Thomas*, 517 U.S. 314, 324, 116 S. Ct. 1293, 134 L. Ed.2d 440 (1996).

In this case, Petitioner has not shown that he was induced or tricked by his adversary’s misconduct. He does not show that he filed a defective proceeding during the statutory period. He has not shown evidence constituting “rare and extraordinary circumstances.” Moreover, he has failed to show that he has been diligently pursuing his rights. Petitioner filed his petition for writ of habeas corpus more than thirteen years beyond the limitations deadline and has not shown that he is entitled to equitable tolling. Consequently, the petition should be dismissed as time-barred.

#### Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding “unless a circuit justice or judge issues a certificate of appealability.” 28 U.S.C. § 2253(c)(1)(A). Although Petitioner has not yet filed a notice of appeal, it is respectfully recommended that this Court, nonetheless, address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because “the district court that denies a petitioner relief is in the best position

to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.”).

A certificate of appealability may issue only if a Petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a “substantial showing of the denial of a constitutional right” in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L. Ed.2d 542 (2000). In cases where a district court rejected a petitioner’s constitutional claims on the merits, “the petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). “When a district court denies a habeas petition on procedural grounds without reaching the petitioner’s underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484.

It is respectfully recommended that reasonable jurists could not debate the denial of the Petitioner’s § 2254 motion on procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 134, 154 L. Ed.2d 931 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is recommended that the Court find that Petitioner is not entitled to a certificate of appealability as to his claims.

#### Recommendation

It is recommended that the above-styled petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 be denied and that this case be dismissed with prejudice. It is further recommended that

a certificate of appealability be denied.

Within fourteen (14) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations contained in the report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

**SIGNED this 29th day of June, 2011.**

  
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DON D. BUSH  
UNITED STATES MAGISTRATE JUDGE